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TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1899.

No. 336 103.

THE CHESAPEAKE AND OHIO RAILWAY COMPANY, PLAINTIFF IN ERROR,

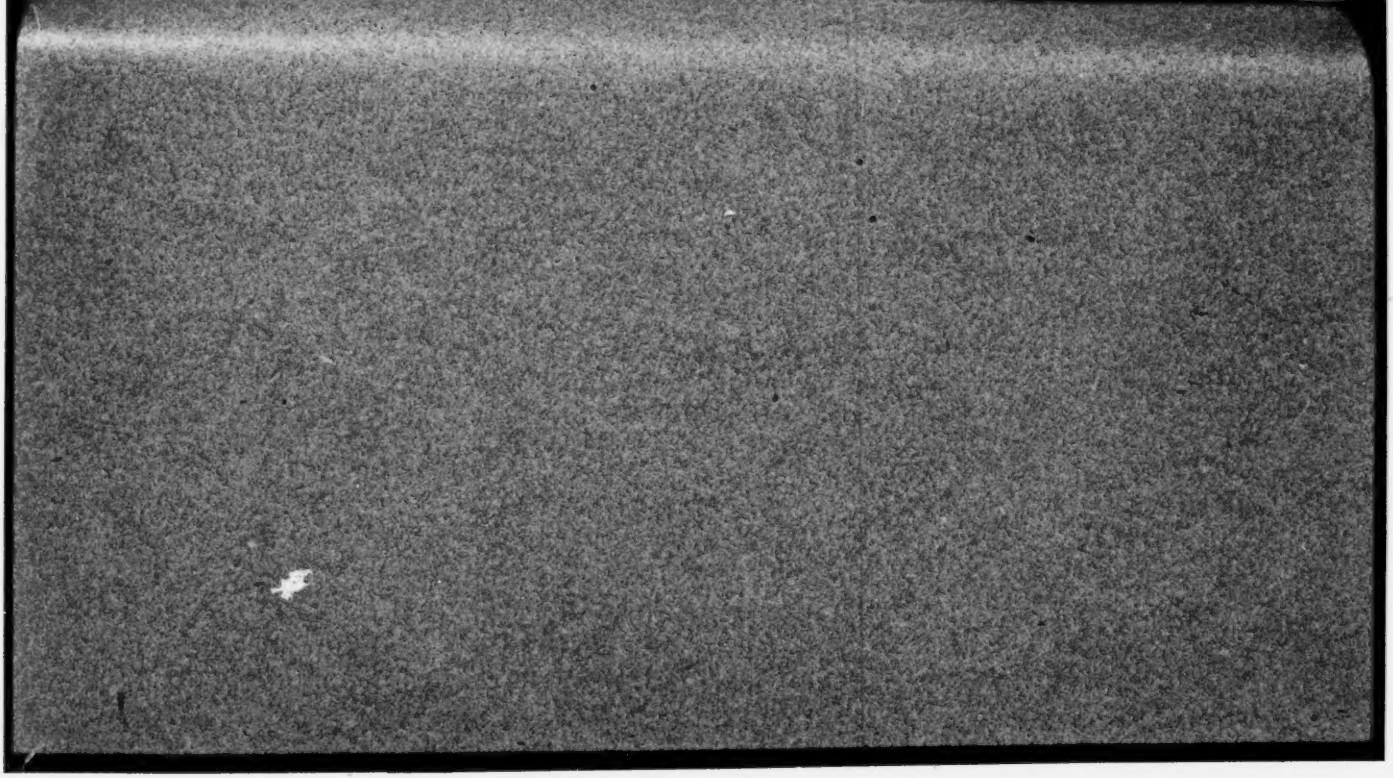
vs.

THE COMMONWEALTH OF KENTUCKY.

IN ERROR TO THE COURT OF APPEALS OF THE STATE OF KENTUCKY.

FILED JULY 21, 1899.

(17,470.)



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a The United States of America to the Commonwealth of Kentucky, Greeting:

You are hereby cited to be and appear at a Supreme Court of the United States, at Washington, within thirty days from the date hereof, pursuant to a writ of error filed in the clerk's office of the court of appeals of Kentucky, wherein The Chesapeake & Ohio Railway Company is plaintiff in error and you are defendant in error, to show cause, if any there be, why the decree rendered against the said plaintiff in error, as in the said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties on that behalf.

Witness the Honorable Melville W. Fuller, Chief Justice of the United States, the 28th day of June, in the year of our Lord one thousand eight hundred and ninety-nine, and of the Independence of the United States of America one hundred and twenty-three.

JAMES H. HAZELRIGG,
Chief Justice of the Court of Appeals of Kentucky.

Service acknowledged this June 30th, 1899.

W. S. TAYLOR,
Attorney General of Kentucky.

b Kentucky Court of Appeals.

CHESAPEAKE & OHIO RAILROAD COMPANY, Appellant,
vs.
COMMONWEALTH OF KENTUCKY, Appellee. } Statement.

Judgment appealed from was rendered September 29th, 1898, at the September term, 1898, of the Shelby circuit court, and is on pages 7 and 8 of this transcript. No summons or warning order required.

1 COMMONWEALTH OF KENTUCKY:

Pleas before the honorable court of appeals of Kentucky, at the capitol, in the city of Frankfort, on the 19th day of May, A. D. 1899.

Present: Chief Justice James H. Hazelrigg, Judges B. L. D. Guffy, George Du Relle, J. D. White, and J. P. Hobson.

CHESAPEAKE & OHIO RAILWAY CO., Appellant,
v.
COMMONWEALTH OF KENTUCKY, Appellee. } Shelby.

Be it remembered that heretofore, to wit, on the first day of November, 1898, the appellant, by its counsel, filed in the office of the clerk of the Kentucky court of appeals a transcript of record as follows:

Preamble and Caption.

Pleas held before the Hon. Wm. Carroll, sole circuit judge of the Shelby circuit court, at the court-house, in Shelbyville, Kentucky, on the 4th day of October, 1898.

Be it remembered that on the 20th day of May, 1898, the following indictment was entered of record in the office of the clerk of the Shelby circuit court, and is in words and figures as follows, to wit:

2 Shelby Circuit Court.

THE COMMONWEALTH OF KENTUCKY
vs.
THE CHESAPEAKE & OHIO RAILROAD COMPANY. } Indictment.

The grand jurors of the county of Shelby in the name and by the authority of the Commonwealth of Kentucky accuse the Chesapeake and Ohio Railroad Company of the offense of unlawfully failing to furnish separate coaches or cars for the transportation of white and colored passengers and failing to have separate coach or compartment to bear, in some conspicuous place, appropriate letters indicating the race for which it is set apart, committed in manner and form as follows, to wit: The Chesapeake and Ohio Railroad Company did, in the said county of Shelby, on the 17th day of May, 1898, and before the finding of this indictment, unlawfully fail to furnish separate coaches or cars for the travel or transportation of the white and colored passengers on its line of railroad, and failed to have each separate coach or compartment to bear, in some conspicuous place, appropriate words in plain letters indicating the race for which it is set apart, it, the said Chesapeake and Ohio Railroad Company, being a corporation duly authorized to do business in this State and operating, owning, controlling, and managing
3 and claiming to own, control, manage, and operate lines of railroad and passenger cars or coaches thereon in and through various counties in the State of Kentucky and through Shelby county, against the peace and dignity of the Commonwealth of Kentucky.

R. F. PEAKE,
Commonwealth's Attorney, 12th Judicial District.

"The summons issued on the foregoing indictment is in words and figures as follows, to wit:"

Shelby Circuit Court.

The Commonwealth of Kentucky to any sheriff, coroner, jailer, constable, marshal, or policeman of this State:

You are hereby commanded to summon the Chesapeake and Ohio Railroad Company to appear in the Shelby circuit court on the first day of its next Sept. term to answer an indictment for failing to furnish separate coaches, &c., found against it in said court.

Given under my hand, as clerk of said court, this 23rd day of June, 1898.

W. M. CARDWELL, *Clerk.*

Sheriff's Return.

Executed August 15th, 1898, on Chesapeake and Ohio
4 Railroad Company by delivering a true copy of the within summons to W. A. Wadsworth, he being the agent of said company.

S. P. PERRIN, *S. M. C.*,
By JAS. McKEE, *D. S.*

"And afterwards the following order was entered of record, which is in words and figures as follows, to wit:"

Shelby Circuit Court, September Term, Sept. 22nd, 1898.

COMMONWEALTH OF KY., Plaintiff,
vs.
CHESAPEAKE AND OHIO RAILROAD COMPANY, Defendant. } Order.

By consent this prosecution is continued until the 10th day of the present term of this court. Then came R. D. Smith and Harvie Bohannon, witnesses for the Commonwealth, and each acknowledged himself indebted to the Commonwealth of Kentucky in the sum of one hundred dollars, to be void, however, as to each of them who shall appear on the 10th day of the present term to testify in behalf of plaintiff and not depart without leave of court.

5 "And afterwards the following order was entered of record, which is in words and figures as follows, to wit:"

Shelby Circuit Court, September Term, Sept. 23rd, 1898.

COMMONWEALTH OF KY., Plaintiff,
vs.
CHESAPEAKE AND OHIO RAILROAD COMPANY, Defendant. } Order.

Came the defendant, by attorney, and filed demurrer to the indictment herein, and the same, being considered by the court, is overruled.

"The demurrer referred to in the foregoing order is in words and figures as follows, to wit:"

Shelby Circuit Court.

COMMONWEALTH OF KY., Plaintiff,
vs.
CHESAPEAKE & OHIO RAILROAD COMPANY, Defendant. } Demurrer.

The defendant, Chesapeake and Ohio Railroad Company,
6 demurres to the indictment herein upon the following grounds:

(1.) The indictment does not substantially conform to the requirements of article 2, chapter 2, title 6, of the Criminal Code of Practice.

(2.) The statute of this Commonwealth upon which said indictment is based, commonly known as the separate-coach law, being the act approved May 24th, 1892, and entitled "An act to regulate the travel or transportation of the white and colored passengers on the railroads of this State," is repugnant to the Constitution of the United States, in that it is a regulation of interstate commerce, and is therefore null and void, and a failure to comply with said statute does not constitute a public offense.

(3.) The facts stated in the indictment does not constitute a public offense.

P. J. FOREE,
Attorney for Defendant.

"And afterwards the following order was entered of record, which is in words and figures as follows, to wit:"

7 Shelby Circuit Court, September Term, Sept. 29th, 1898.

COMMONWEALTH OF KY., Plaintiff,
vs.
CHESAPEAKE AND OHIO RAILROAD COMPANY, Defendant. } Order.

Came the Commonwealth and county attorney and the defendant and appeared by attorney and pleads not guilty of the offense as charged in the indictment, and to try the issue came this jury, to wit, W. B. Arnold, J. R. Anderson, F. J. Cleveland, M. P. Cinnamon, M. Eggen, Miller Fields, J. M. Graves, Top Lewis, D. I. Shipman, Miller Wilhoite, E. C. Woods, and Noble Zaring, who were duly accepted and sworn to well and truly try the issue and a true verdict render, and, having heard the indictment read and statement of defendant's plea and the evidence of the plaintiff, the defendant moved for peremptory instructions for the jury to find for the defendant; said motion is overruled; to which defendant excepts; and the jury, having heard the evidence in full, instructions of the court, and argument of counsel, rendered this verdict: "We, the jury, find the defendant guilty and fix the fine at $500.00. J. R. Anderson, foreman." It is therefore adjudged that the defendant, The Chesapeake and Ohio Railroad Company, is guilty of the offense as charged in the indictment, and that the Commonwealth of Kentucky recover of said defendant the sum of five hundred dol-
8 lars and its costs herein expended; to all of which defendant excepts.

"The instructions of the court are in words and figures as follows, to wit:"

Instruction "A."

The jury are instructed that if they believe from the evidence, beyond a reasonable doubt, that the defendant, The Chesapeake and Ohio Railroad Company, is a corporation doing business in this State, and operating, owning, controlling, and managing lines of

railroad through Shelby county, and running and managing and controlling passenger coaches and cars thereon, and within the twelve months before May 20th, 1898, failed to furnish separate coaches or cars for the travel or transportation of white and colored passengers, with each separate coach or compartment bearing in some conspicuous place appropriate words in plain letters indicating the race for which it is set apart, they should find the defendant guilty and fix its fine at any sum not less than $500.00 nor more than $1,500.00.

If upon the entire case they have a reasonable doubt of the defendant's having been proved guilty, they should find it not guilty.

9 *Instruction No. 1.*

The court instructs the jury that if they believe from the evidence that the defendant furnished separate coaches for the transportation of white and colored passengers and signs for such coaches, bearing appropriate words in plain letters, indicating the race for which such coaches were set apart, they will find for defendant, though they may believe that negroes were permitted by the conductor to ride in coaches set apart for the whites or the whites in coaches set apart for negroes.

Instruction No. 2.

The court instructs the jury that if they believe from the evidence that they defendant furnished separate coaches or compartments of coaches for the travel or transportation of the white and colored passengers on its line of railroad through Shelby county, and signs, bearing appropriate words in plain letters, indicating the race for which said coaches were set apart, on May 20th, 1898, and for the 12 months previous thereto, they will find for defendant, although they may believe that at times said signs were left down by the conductors or those in charge of the trains by inadvertence or were torn down by passengers.

"And afterwards the following order was entered of record, which is in words and figures as follows, to wit:"

10 Shelby Circuit Court, September Term, Sept. 30th, 1898.

COMMONWEALTH OF KY., Plaintiff,
vs.
CHESAPEAKE AND OHIO RAILROAD COMPANY, Defendant. } Order.

Came plaintiff, by attorney, and filed motion in arrest of judgment herein. The questions on said motion being considered by the court, same is overruled; to which defendant excepts.

"The motion referred to in the foregoing order is in words and figures as follows, to wit:"

Shelby Circuit Court.

COMMONWEALTH OF KY., Plaintiff,
vs.
CHESAPEAKE & OHIO RAILROAD COMPANY, Defendant. } Motion.

Comes the defendant and moves the court in arrest of
11 judgment herein, but says that no judgment should be rendered against it for the reason that the facts stated in the indictment do not constitute a public offense within the jurisdiction of the court.

Second. That the law under which this indictment is found is an invasion of section 8, subsection 3, of the United States Constitution, known as the commerce clause of the Constitution, and is therefore unconstitutional, null, and void.

P. J. FOREE,
Attorney for Defendant.

"And afterwards the following order was entered of record, which is in words and figures as follows, to wit:"

Shelby Circuit Court, September Term, Sept. 30th, 1898.

COMMONWEALTH OF KY., Plaintiff,
vs.
CHESAPEAKE & OHIO RAILROAD COMPANY, Defendant. } Order.

Came defendant, by attorney, and moved the court to grant it a new trial herein upon written grounds filed.

12 "The grounds for a new trial referred to in the foregoing order *is* in words and figures as follows, to wit:"

Shelby Circuit Court.

COMMONWEALTH OF KY., Plaintiff,
vs.
CHESAPEAKE AND OHIO RAILROAD COMPANY, Defendant. } Motion and Grounds for a New Trial.

The defendant, Chesapeake and Ohio Railroad Company, comes and moves the court to grant it a new trial herein, and for grounds says:

First. That the court erred in overruling its demurrer to the indictment herein, to which the defendant excepted at the time.

Second. The court erred in overruling its motion for a peremptory instruction, to which defendant excepted at the time.

Third. The verdict of the jury is against the law and evidence.

Fourth. Misconduct of the jury, in that it failed to observe the law and regard the instructions of the court, by reason of which defendant has not received a fair and impartial trial.

13 Fifth. Misconduct of the Commonwealth's attorney in arguing and in saying to the jury that if they would bring in a verdict of guilty that their wives and daughters would not be compelled hereafter to ride in coaches with negroes, and that such affairs as the McEwan case would not be repeated in your State, and in also arguing to the jury that the railroad company was trying to avoid the separate-coach law; to all of which the defendant, by attorney, objected at the time. The attorney for the Commonwealth then went back to arguing the facts, and this objection was not passed upon; but by reason of this misconduct of Commonwealth's attorney, the appeal to the prejudice of the jury, the defendant was prevented from having a fair trial.

Sixth. The court erred in giving instruction "A" for the Commonwealth; to which defendant objected at the time, and, objection being overruled, defendant excepted.

Seventh. The court erred in admitting the witness Harvey Bohannon to state that he had been on the train when colored passengers were allowed to and did ride in the white people's coach, and in allowing said witness and R. D. Smith and this witness for the Commonwealth to testify as to the failure of defendant to furnish separate coaches with proper signs on other days than that charged in the indictment; to all of which defendant objected at the time, and the objection was overruled, to which defendant excepts.

P. J. FOREE,
Att'y for Def't.

14 "And afterwards the following order was entered of record, which is in words and figures as follows, to wit:"

Shelby Circuit Court, September Term, Oct. 4th, 1898.

COMMONWEALTH OF KY., Plaintiff,
vs.
CHESAPEAKE AND OHIO RAILROAD COMPANY, Defendant. } Order.

The questions on motion for a new trial herein being considered by the court, the same is overruled; to which defendant, by attorney, excepts, and prays an appeal from the judgment herein to the court of appeals, which is granted upon condition that he lodge in the clerk's office of said court a transcript of the record in sixty days from the date of judgment.

"And afterwards the following order was entered of record, which is in words and figures as follows, to wit:"

15 Shelby Circuit Court, September Term, Oct. 4th, 1898.

COMMONWEALTH OF KY., Plaintiff,
vs.
CHESAPEAKE & OHIO RAILROAD COMPANY, Defendant. } Order.

Came defendant, by attorney, and tendered and filed *his* "bill of exceptions" herein, which was examined, approved, and signed by

the judge and is ordered to be made a part of the record herein without being spread on the order book.

"The 'bill of exceptions' referred to in the foregoing order is in words and figures as follows, to wit:"

16 Shelby Circuit Court.

COMMONWEALTH OF KY., Plaintiff,
vs.
CHESAPEAKE & OHIO RAILROAD COMPANY, Defendant. } Bill of Evidence.

Be it remembered that September 29th, 1898, on the trial of the cause in which The Commonwealth of Kentucky was plaintiff and Chesapeake and Ohio Railroad Company was defendant, before the Hon. William Carroll, judge, and a jury, in the Shelby circuit court, at the court-house, in Shelbyville, Kentucky, the following evidence was heard and the following proceedings were had:

The case being called for trial, a jury was examined, and selected, and accepted, and duly sworn by the clerk. The indictment was read to the jury; to which indictment the defendant plead not guilty.

It was then admitted by the attorney, Mr. P. J. Foree, for the defendant, and Mr. R. F. Peake, Commonwealth's attorney, that the Chesapeake & Ohio Railroad Company is a corporation doing business in this State and owning, managing, control-ing, and operating trains of passenger cars over railroad lines through Kentucky and through Shelby county, and was at the time charged in
17 this indictment such corporation, — was owning, managing, and controlling passenger coaches over the line of railroad in this county under a lease of right of trackage.

It is further agreed that all of the passenger cars that defendant thus operated through Kentucky are cars that came into Kentucky through another State.

It is agreed, this being a foreign corporation, that it has complied with the laws of Kentucky with reference to filing its articles of incorporation with the railroad commissioners and the secretary of state; that the trains run from Newport News, Virginia, to Louisville, Kentucky, and form a continuous line.

The plaintiff then introduced D. Ross SMITH as a witness in its behalf, who, having been first duly sworn, and examined by Mr. R. F. Peake, Commonwealth's attorney, testified as follows:

Q. Mr. Smith, where were you residing the twelve months previous to the 20th day of May, 1898?

A. In Shelby county.

Q. State whether or not during the twelve months preceeding the 20th day of May you were a passenger on the trains, known as the Chesapeake & Ohio train, operated by the Chesapeake & Ohio Railroad Company.

Question objected to by Mr. P. J. Foree, attorney for the defendant. Objection overruled by Hon. William Carroll, judge;
18 to which ruling defendant excepts.

A. I was.

Q. How frequently during that time were you a passenger on said train, Mr. Smith?

A. I suppose, seven or eight times.

Q. State first what coaches comprised the train that you traveled on.

A. The sleeper and day coach, and then a coach in front of that. I suppose the baggage car.

Q. Now, behind the day coach was what?

A. Was the sleeper.

Q. In front of the day coach?

A. Baggage car.

Q. Anything else in front besides the baggage car? Do you know whether or not a smoker — there?

A. Do not. I have always gone on the coach next to the sleeper.

Q. State if you noticed any colored persons traveling in the coaches with white persons.

Question objected to by Mr. P. J. Foree, attorney for the defendant. Objection overruled by Hon. William Carroll, judge; to which ruling defendant excepts.

A. Yes, sir.

Q. Can you say whether or not separate compartments were furnished by that railroad company on its coaches on which
19 you traveled for white and colored passengers, indicating the compartment that was set apart for each race by letters of sufficient size in places to be easily seen by passengers?

Question objected to by Mr. P. J. Foree, attorney for the defendant. Objection overruled by Hon. Wm. Carroll, judge; to which ruling defendant excepted.

A. No, sir; I have been on it several times, and I never noticed any there.

Q. What county were you traveling in at the time you failed to notice any separate compartment or letters indicating the compartment set apart for each race when colored passengers were in the car with white passengers?

A. That was in Jefferson county; I went down on the L. & N. and came back on the C. & O.

Q. Was that in Shelby county you noticed that condition of things?

Question objected to by Mr. P. J. Foree, attorney for the defendant. Objection overruled by Hon. Wm. Carroll, judge; to which ruling defendant excepted.

A. Yes, sir; I noticed it once or twice and didn't see anything of that kind.

Q. You were traveling in Shelby county between what points?
A. Between here and Louisville.

Cross-examined by Mr. J. P. FOREE, attorney for the defendant:

Q. You say you went into the coach next to the sleeper?
A. Yes, sir.
Q. Don't you know, as a matter of fact, the coach you say was the baggage car also had compartments in it?
A. No, sir; I didn't go in there, but no sign on the rear end of that coach.
Q. You don't know that coach was divided into compartments?
A. No, sir; never been in there.

Plaintiff then introduced HARVE BOHANNON as a witness in its behalf, who, being first duly sworn, and examined by Mr. R. F. Peake, Commonwealth's attorney, testified as follows:

Q. During the twelve months just preceding the 20th of May, 1898, were you or not a passenger on the Chesapeake & Ohio Railroad trains?

Question objected to by Mr. P. J. Foree, attorney for the defendant. Objection overruled by Hon. Wm. Carroll, judge; to which ruling defendant excepted.

A. I was a passenger on it during *it* last May; I believe it was during court.
Q. Was that the first day of the term?
A. I think it was.
Q. What were you attending court for at the May term, Mr. Bohannon?
A. I think I was a grand juryman.
Q. A member of the grand jury?
A. Yes, sir.
Q. Where did you travel to on the defendant's cars on that occasion; where from and to?
A. From Bagdad to Shelbyville.
Q. How frequently did you travel during that term of the court on that train, Mr. Bohannon?
A. I was several trips; I didn't remember how many.
Q. State whether or not colored passengers occupied the coach with white passengers.

Question objected to by Mr. P. J. Foree, attorney for the defendant. Objection overruled by Hon. William Carroll, judge; to which ruling defendant excepted.

A. Yes; I saw colored persons in the coach with white persons.
Q. State whether or not there was separate compartments on that train for the travel of colored and white passengers, and indicating the separate compartment by letters and sign placed in a conspicuous place so they might be easily seen.
A. I saw none.

Q. Was your attention directed to that matter, Mr. Bohannon?

22 A. It was.

Q. After your attention was directed to that matter, state whether or not you made some inspection to see if such a sign was up.

A. I looked, but I saw no signs; no advertisements at all.

Cross-examined by Mr. P. J. FOREE, attorney for the defendant:

Q. You rode in the coach next to the sleeper, Mr. Bohannon?
A. I think so.
Q. There was a coach in front?
A. Yes, sir; there was a coach in front of me.
Q. That coach in front was divided into compartments?
A. I don't know that it was. I didn't go into it.
Q. You didn't go into that coach?
A. No, sir.

Redirect examination by Mr. R. F. PEAKE, Commonwealth's attorney:

Q. Did you notice the coach in front of the one you were in and see the baggage car—one-half of it a baggage car and the other half a smoker?

A. No, sir; I didn't notice that.

23 Defendant, by its attorney, Mr. P. J. Foree, then moved the court to give it a peremptory instruction and instruct the jury to find for the defendant; to which motion the plaintiff objected. Objection overruled by Hon. Wm. Carroll, judge, and peremptory instructions refused; to which ruling the defendant excepted.

Defendant then introduced Capt. CARMICHAEL as a witness in its behalf, who, being first duly sworn, and examined by Mr. P. J. Foree, attorney for the defendant, testified as follows:

Q. What is your name?
A. J. R. Carmichael.
Q. Are you the conductor on one of the Chesapeake and Ohio trains?
A. I am.
Q. How long have you been a conductor for the Chesapeake and Ohio?
A. About twelve years.
Q. How long have you been on the train that runs through Shelby county?
A. I run one of the first ones; the Chesapeake & Ohio road came through Shelbyville.

24 Q. Are you familiar with the coaches that is run by the Chesapeake & Ohio through Shelby county?

A. I am.

Q. Tell the jury whether or not separate coaches have been furnished by the Chesapeake & Ohio Railroad Company—that is, coaches for the whites and blacks—during the twelve months previous to May 20th, 1898.

Question objected to by Mr. R. F. Peake, Commonwealth's attorney. Objection overruled by Hon. Wm. Carroll, judge; to which ruling Commonwealth's attorney excepted.

A. They have furnished separate coaches ever since I have been running down here, on all the trains I have run.

Q. Have they furnished signs to be posted up that indicated the race that the different coaches were set apart to?

A. They did.

Q. What size signs are they?

A. Well, I should judge about fourteen or sixteen inches long, with letters on them an inch across each way.

Q. What would these signs have on them?

A. For colored passengers, or for white passengers.

Q. Some signs had for white passengers and some for colored?

A. Yes, sir.

Q. What were done with these signs?

A. Hung up on the coaches to indicate which car set apart
25 for each race. We generally drove a tag up and hung them up.

Q. These signs plain large letters, so they could be read?

A. Yes, sir.

Q. Were you in charge on one of the trains on May 17th, 1898, from Newport News to Louisville, Kentucky—the morning train?

A. May 17th, 1898, I was running the train that runs west; took charge of it at Ashland.

Q. When are these signs put up?

A. Well, as a general thing, stay up pretty nearly all the time when they hadn't blown down or torn down by the passengers who might be drinking or something.

Q. You don't know about the signs when they get out of the State or as they are coming into the State?

A. No, sir.

Q. Did that train that you were in charge of on May 17th have separate coaches for the races?

A. I had four cars in the train—the first one was the baggage and express and mail car; the next one, #348, a compartment car; the next one was the coach, #346, used as a white car, and the sleeper car Cola.

Cross-examined by Mr. R. F. PEAKE, Commonwealth's attorney:

Q. During the twelve months previous to the 20th of May, 1898, can you say to the jury that every train that passed through
26 Shelby county belonging to the defendant had the signs up indicating the compartment, or race, rather, for which it was intended?

A. No, sir; I cannot.

Q. Can you say that every time you took a train through Shelby county during that period that the signs were up?

A. No, sir; I cannot.

Redirect examination by Mr. P. J. FOREE, attorney for the defendant:

Q. You can say these signs were furnished and the coaches furnished?

A. Yes, sir; I have seen many a time passengers walk up to one of these doors and tear the sign down and throw it down in the corner, and then I would be some place where I couldn't have him arrested.

Recross-examination by Mr. R. F. PEAKE, Commonwealth's attorney:

—. During that period of time is it not a fact that the trains on which you were a conductor permitted colored passengers who boarded them in the State of Kentucky to travel to some other point in Kentucky; that these colored passengers were permitted to occupy the day coach of white passengers?

Question objected to by Mr. P. J. Foree, attorney for the de-
27 fendant. Objection sustained by Hon. Wm. Carroll, judge; to which ruling the Commonwealth's attorney excepted.

Q. Captain, do you have any specific recollection as to the 17th day of May, 1898?

A. No, sir; I have not.

Q. Can't say whether or not on that day your signs were up or not?

A. I couldn't say positively they were all up, but to the best of my knowledge certainly some of them — up.

Q. Did you have a sign on the white passengers' day coach?

A. To the best of my knowledge, I did.

Q. On each end?

A. I couldn't say, but generally the car did on the front end.

Q. Did you have a sign on that day for colored passengers?

A. To the best of my knowledge, I did.

Q. A while ago you said you couldn't state whether or not the signs were up?

A. I said I couldn't positively state that the signs were up that day.

Q. And you can't positively so state now?

A. No, sir; to the best of my knowledge, they were up.

28 Q. Where was the coach set apart for the colored passengers?

A. Between the mail and express car and the next car, which would be second car from the engine; that would be the one set apart for colored passengers.

Q. Now, isn't it a fact the baggage car—one end of the smoking car is used for a baggage car?

A. Not on that train that arrives in Louisville in the evening — has three cars; one is used for baggage, one for colored passengers.
Q. What is the next one?
A. For white passengers.
Q. What is the next one?
A. Sleeping car.
Q. Where is the smoking car?
A. Have none on that train.
Q. Is the colored car used for a smoker?
A. Not when any colored passengers in it.

Redirect examination by Mr. P. J. FOREE, attorney for the defendant:

Q. I understand from you this car is composed of a baggage-car compartment and another compartment which is set apart for the colored race?
A. Yes, sir.
29 Q. If they have any colored people do they permit white people to go in there and smoke?
A. Once in a while they do, when they have no colored people.

Defendant then introduced L. S. STUART as a witness in its behalf, who, being first duly sworn, and examined by Mr. P. J. FOREE, attorney for the defendant, testified as follows:

Q. Your name, I believe, is L. S. Stuart?
A. Yes, sir.
Q. What position do you hold with the Chesapeake and Ohio?
A. I am trainmaster between Louisville and Ashland.
Q. How long have you been trainmaster?
A. About eight years.
Q. Are you familiar with the trains that are operated by the Chesapeake & Ohio Railroad Company from Newport News, in Virginia, to Louisville, Kentucky?
A. Yes, sir.
Q. That have been operated twelve months previous to May the 20th, 1898?
A. Yes, sir.
Q. State whether or not the Chesapeake & Ohio during that twelve months at all times has furnished separate coaches.
A. Yes, sir.
30 Q. State whether or not these separate coaches had signs indicating in words or letters plainly the race that the coaches were set apart for.
A. Yes, sir; they have portable signs.
Q. What kind of signs are they?
A. Printed on card; the cards are about as wide as a car window; I suppose fourteen or fifteen inches long and two or three inches wide.
Q. What words would be on those signs?
A. Well, for white passengers on one card, and for colored passengers on another.

Q. The cards bearing the words white passengers, what coach — that intended for?

A. For white passengers.

Q. The one bearing the word for colored passengers?

A. For colored passengers.

Q. These signs furnished for all of the coaches operated prior to May 20th, 1898?

A. Yes, sir.

Q. Were separate coaches furnished during all of that time?

A. Yes, sir.

Q. That is, coaches for the white passengers and coaches for the colored passengers?

A. Yes, sir.

31 Q. All passenger trains operated during that time have such coaches?

A. Yes, sir; all regular trains.

Q. You mean by regular trains——

A. Scheduled trains—run on the same time every day.

Q. You mean trains carrying passengers?

A. Yes, sir.

Q. Your extras furnished to certain passengers have no such signs?

A. No, sir.

Q. Where these signs you furnished, were they such as could be easily read—plain?

A. Yes, sir.

Cross-examined by Mr. R. F. PEAKE, Commonwealth's attorney:

Q. Were you on every train, on every trip that each train took during the year—twelve months just preceding May 20th, 1898?

A. No, sir.

Q. Do you mean to say these signs were up properly, at the proper places, on every train during that period?

A. No, sir; I couldn't say that.

Q. You mean to say, then, that the company at some point on its lines had such cards made and given to somebody else for the purpose of being put up?

32 A. They were furnished for that purpose. I have never been on any train that they were not up.

Q. You don't know that they were up on every train?

A. No, sir; couldn't swear to that.

Q. You never come through Shelby county on one of the trains during that period?

A. What period?

Q. The twelve months preceding the 20th day of May, 1898.

A. Yes, sir.

Q. Now every train through?

A. No, sir.

Redirect examination by Mr. P. J. FOREE, attorney for the defendant:

Q. Who furnished the conductor these signs indicating the race to which the coaches were set apart?
A. The railroad company furnished them.
Q. What was your duty as to them?
A. I carry them in stock, as all conductors' supplies, and they come to my office and draw them.
Q. Your place to see the coaches furnished?
A. Yes, sir.
Q. Were they furnished?
A. Yes, sir.

33 Upon the conclusion of the testimony the Commonwealth's attorney asked the court to give instruction "A," which is as follows: "The jury are instructed that if they believe from the evidence beyond a reasonable doubt that the defendant, The Chesapeake & Ohio Railroad Company, is a corporation doing business in this State and operating, owning, controlling, and managing lines of railroad through Shelby county, and running and managing and controlling passenger coaches and cars thereon, and within the twelve months before May 20th, 1898, failed to furnish separate coaches on cars for the travel or transportation of white and colored passengers, with each separate coach or compartment bearing in some conspicuous place appropriate words in plain letters indicating the race for which it is set apart, they should find the defendant guilty and fix its fine at any sum not less than $500.00 nor more than $1,500.00.

If upon the entire case the jury have a reasonable doubt of the defendant having been proven guilty, they should find it not guilty.

Defendant objected to the giving of this instruction; his objections was overruled and said instruction given; to which he excepted at the time.

The defendant then moved the court to give instruction- Nos. 1 and 2, which are as follows:

34 *Instruction No.* 1.

The court instructs the jury that if they believe from the evidence that defendant furnished separate coaches or cars for the transportation of white and colored passengers, and signs for such coaches, bearing appropriate words in plain letters, indicating the race for which said coaches were set apart, they will find for defendant, although they may believe that negroes were permitted by the conductors to ride in coaches set apart for the whites, or the whites in the coaches set apart for the negroes.

Instruction 2.

The court instructs the jury that if they believe from the evidence that the defendant furnished separate coaches or compartment- of coaches for the travel or transportation of the white and colored passengers on its line of railroad through Shelby county, and signs, bearing appropriate words in plain letters, indicating the race for which said coaches were set apart, on May 20, 1898, and for the twelve months previous thereto, they will find for defendant, although they may believe that at times said signs were left down by the conductors or those in charge of the trains by inadvertence or were torn down by passengers.

To which the Commonwealth's attorney objected; his objection was overruled and both of said instructions given; to which he excepted at the time. The foregoing instructions are the only ones that were offered, given, or refused.

35 The Commonwealth's attorney, in his argument to the jury, told them that the defendant was trying to avoid observing the separate-coach law, but if they would bring in a verdict of guilty the railroad would see that the law was observed, and the wives and daughters of the jurors would not be compelled to ride in the same coach with noisy, greasy, dirty negroes; to all of which defendant objected at the time; but before the court could pass upon this objection the Commonwealth's attorney dropped this line of talk and returned to the facts, so that the objection was really never passed upon.

Then came defendant and tendered this his bill of exceptions; which having been examined by the judge, it is hereby certified that it contains all the evidence and is a true bill of exceptions, and is approved by the judge, and is ordered to be filed and made a part of the record without being spread upon the order book.

Witness my hand as judge of the Shelby circuit court, hereto set this October 4th, 1898.

WM. CARROLL, *Judge.*

36 "And afterwards the following schedule was filed, which is in words and figures as follows, to wit:"

Shelby Circuit Court.

COMMONWEALTH OF KENTUCKY, Plaintiff,
vs.
THE CHESAPEAKE & OHIO RAILROAD COMPANY, Defendant. } Schedule.

The clerk of the Shelby circuit court is directed to copy the entire record in this case.

P. J. FOREE,
Attorney for Plaintiff.

Notice of filing the above schedule is accepted this October 15th, 1898.

R. L. PULLIAM,
County Attorney.

37 CHESAPEAKE & OHIO RAILROAD COMPANY, Appellant,
vs.
COMMONWEALTH OF KENTUCKY, Appellee.

Upon an appeal from a judgment of the Shelby circuit court rendered 29th day of September, 1898.

Whereas said appellant, Chesapeake & Ohio Railroad Company, an appeal from the judgment of the Shelby circuit court rendered at its September term, 1898, against it in favor of the appellee for the sum of five hundred ($500.00) dollars and the appellant desires to supersede the enforcement of the said judgment above mentioned:

Now, we, Chesapeake & Ohio Railroad Company, principal, and George B. Nelson, surety, do hereby covenant to and with the appellee, The Commonwealth of Kentucky, that the appellant will pay to the appellee all costs and damages that may be adjudged against the appellant on the appeal, and also that they will satisfy and perform the whole of said judgment above stated in case it shall be affirmed, and any judgment or order which the court of appeals may render or order to be rendered by the inferior court, not exceeding in amount or value the whole judgment aforesaid (and also pay all rents, hire, or damage which during the pendency of the appeal may accrue on any part of the property of which the appellee is kept out of possession by reason of the appeal).

Witness our hands this 27th day of October, 1898.

CHESAPEAKE & OHIO RAILROAD COMPANY,
By P. J. FOREE, *Attorney.*
GEO. B. NELSON,
By P. J. FOREE, *Att'y-in-fact.*

38 *Certificate.*

I, W. M. Cardwell, clerk of the Shelby circuit court, certify that the foregoing contains a full and complete transcript of the case of The Commonwealth of Kentucky *vs.* The Chesapeake & Ohio Railroad Company, as appears of record in my office.

Given under my hand as clerk of said court this 20th day of October, 1898.

W. M. CARDWELL,
Cl'k S. C. C.

Afterwards, at a court of appeals held in and for the Commonwealth of Kentucky, as aforesaid, on the 2d day of January, 1899, the following order was entered herein:

On motion of appellant, by counsel, this cause is set for oral argument on January 12, 1899.

Afterwards, on January 12, 1899, the following order was entered herein:

By consent this cause is passed to be heard on January 27, 1899.

39 Afterwards, on January 27, 1899, the following order was entered herein:

This cause coming on to be heard was argued by R. F. Peake for appellee and John T. Shelby for appellant and submitted.

Afterwards, on May 19, 1899, the following judgment was entered herein:

CHESAPEAKE & OHIO RAILROAD CO., Appellant, v. COMMONWEALTH OF KENTUCKY, Appellee. } Appeal from Shelby Circuit Court.

The court being sufficiently advised, it seems to them there is no error in the judgment herein. It is therefore considered that said judgment be affirmed, and that appellee recover of appellant ten per cent. damages on the amount of the judgment herein superseded, which is ordered to be certified to said court.

It is further considered that appellee recover of appellant its cost herein expended.

On the same day, to wit, May 19, 1899, the court, through Judge White, delivered the following opinion herein:

CHESAPEAKE & OHIO RAILROAD COMPANY, Appellant, vs. COMMONWEALTH OF KENTUCKY, Appellee. } Appeal from Shelby Circuit Court.

40 The appellant, The Chesapeake & Ohio Railroad, was indicted and convicted in the Shelby circuit court for a failure to furnish separate coaches for both white and colored passengers, and failing to have each car bear in some conspicuous place appropriate words in plain letters indicating the race for which such car was intended. The fine assessed was the minimum fixed by statute, $500.00. From the judgment of conviction this appeal is prosecuted.

It is insisted that the indictment is defective in that it charges two offenses—one for failing to furnish cars and one for failing to designate by lettering the cars for white and colored persons.

It is also insisted that the separate-coach law is unconstitutional, as being a regulation of interstate commerce, which is exclusively within the powers of Congress, as given by the eighth section of the Federal Constitution.

It is also insisted that there is no evidence to support the charge in the indictment, and that the verdict should be therefore set aside.

We are of the opinion that the indictment charges but one offense, and that but one offense is designated in the statute. It may be committed by a failure to have separate coaches or by a failure, if more than one coach for passengers be in a train, to designate by lettering which coach is designated for white and which for colored passengers. It cannot be said that if appellant had in each passenger

train more than one coach for passengers it would then be
41 relieved from the duty of designating which of those cars were intended for the white and which for the colored race.

The statute makes it the duty to not only furnish separate cars for the races, but also to designate for which race each car is intended. A failure to observe these provisions is a violation of the law and subjects the offending party or company to the penalty prescribed. The validity of the statute has been before this court in the case of Ohio Val. R'y Rec'r *vs.* Lander, 47 S. W. Rep., 344 and 882, and it was there held that the act was not in violation of the Federal Constitution, either as to the commerce clause or the 14th amendment. The opinion of the court, page 344, by Mr. Justice Guffy is a clear statement of the law of this case, and is decisive of all questions here raised as to the validity of the act.

In the recent case of Lake Shore & M. S. R'y *v.* State of Ohio, decided by the Supreme Court of the U. S. February 20, 1899, in a decision by Mr. Justice Harlan, the doctrine of this court as announced in the Lander case was reaffirmed.

As to the contention that there should be a reversal of the judgment on account of the evidence, this cannot be done. The rule in criminal and penal cases is that if there be any testimony tending to prove the facts charged it will be upheld.

While the evidence in this case may not be as clear and convincing as might be desired, yet it cannot be said that there is an entire failure of any proof tending to show guilt. We perceive no prejudicial error in the admission of testimony. The argument of the prosecuting attorney is complained of, but there appears no
42 exceptions that will bring the matter before us for review.

There appears no error in the judgment, and the same is affirmed with damages.

Afterwards, on the 30th day of June, A. D. 1899, the appellant and plaintiff in error filed in the office of the clerk of the court of appeals its writ of error as follows (a copy of which is on file in said clerk's office):

43 UNITED STATES OF AMERICA, *ss:*

The President of the United States of America to the honorable the justices of the court of appeals of the Commonwealth of Kentucky, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said court of appeals of the Commonwealth of Kentucky, before you or some of you, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The Commonwealth of Kentucky and The Chesapeake & Ohio Railway Company, wherein was drawn in question the validity of a treaty or statute of or an authority exercised under the United States and the decision was against their validity, or wherein was drawn in question the validity of a statute of or an authority exercised under

said State, on the ground of their being repugnant to the Constitution, treaties, or laws of the United States, and the decision was in favor of such their validity, or wherein was drawn in question the construction of a clause of the Constitution or of a treaty or statute of or commission held under the United States and the decision was against the title, right, privilege, or exemption specially set up or claimed under said clause of the Constitution, treaty, statute, or commission, a manifest error hath happened, to the great damage of the said Chesapeake & Ohio Railway Company, as by its complaint appears, we, being willing that error, if any has been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and

44 openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington, within thirty days from the date hereof, in the said Supreme Court, to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Seal 6th Circuit Court, Ky. Dis., U. S. of America.

Witness the Honorable Melville W. Fuller, Chief Justice of the said Supreme Court, the 28th day of June, in the year of our Lord one thousand eight hundred and ninety-nine.

THOS. SPEED,
Clerk U. S. Circuit Court, Ky. Dist.,
By HENRY F. CASSIN,
Deputy Clerk.

Allowed by—
JAMES H. HAZELRIGG,
Chief Justice of the Court of Appeals of Kentucky.

45 On the same day, to wit, June 30, 1899, the plaintiff in error filed in said clerk's office its bond as follows:

Know all men by these presents that we, the Chesapeake & Ohio Railway Company, as principal, and G. B. Nelson, as surety, are held and firmly bound unto the Commonwealth of Kentucky in the full and just sum of one thousand dollars ($1,000), to be paid to said Commonwealth; and to which payment, well and truly to be made, we bind ourselves, jointly and severally, firmly by these presents.

Witness our hands and seals this 30th day of June, 1899.

Whereas lately, at the April term, 1899, of the court of appeals of Kentucky, in a suit pending in said court between the said Chesapeake and Ohio Railway Company, as appellant, and The Commonwealth of Kentucky, as appellee, a judgment was rendered against the said party appellant, and the said party appellant hath obtained

and is prosecuting a writ of error to reverse the judgment aforesaid:

Now, the condition of the above obligation is such that if the said Chesapeake & Ohio Railway Company shall prosecute its said writ of error to effect and answer all damages and costs if it fail to make its plea good, then the above obligation to be void; else to remain in full force and virtue.

CHESAPEAKE & OHIO RAILWAY COMPANY,
By JNO. T. SHELBY, *Attorney.*
GEO. B. NELSON.

46 STATE OF KENTUCKY, } *sct:*
Fayette County, }

I, G. S. Shanklin, a notary public within and for Fayette county, Kentucky, certify that the foregoing instrument was this day produced to me, in said county and State, and was acknowledged by John T. Shelby for and on behalf of the Chesapeake & Ohio Railway Company to be its act and deed, and was also acknowledged by George B. Nelson, the surety mentioned therein, to be his act and deed.

Given under my hand and official seal this 30th day of June, 1899.

My commission as notary expires February 8th, 1902.

GEO. S. SHANKLIN,
Notary Public, Fayette County, Kentucky.

Approved by—
JAMES H. HAZELRIGG,
Chief Justice Ct. Appeals of Ky.

On the same day, to wit, June 30, 1899, the plaintiff in error filed in said clerk's office its assignment of errors as follows:

47 Supreme Court of the United States.

CHESAPEAKE & OHIO RAILWAY COMPANY, Plaintiff in Error, *vs.* COMMONWEALTH OF KENTUCKY, Defendant in Error. } Assignment of Errors.

The Chesapeake & Ohio Railway Company, plaintiff in error in the above-entitled case, complains of the judgment rendered therein by the court of appeals of Kentucky, and for error therein assigns the following:

1. The said court of appeals erred in affirming the judgment of the Shelby circuit court, whereas it should have reversed the same, with directions to sustain the demurrer to the indictment.

2. The said court of appeals erred in holding that the statute of Kentucky commonly known as the "separate-coach act," being an act of the General Assembly of the Commonwealth of Kentucky

entitled "An act to regulate the travel or transportation of the white and colored passengers on the railroads of this State," approved May 24, 1892, was valid, whereas it should have held that the said statute was invalid and void, because in conflict with the following portions of the Constitution of the United States, to wit, with article I, section 8, subsection 3, relating to the regulation of commerce between the States, and with section 1 of the fourteenth amendment

Wherefore the said Chesapeake & Ohio Railway Company
48 prays that the said judgment of the court of appeals of Kentucky be reversed.

JNO. T. SHELBY,
Attorney for Plaintiff in Error.

49 COMMONWEALTH OF KENTUCKY, } *sct:*
Court of Appeals, }

I, Samuel J. Shackelford, clerk of the Kentucky court of appeals, certify that the preceding 48 pages contain a true and complete transcript of the record and proceedings had in said court in the case of Chesapeake & Ohio Railroad Company, appellant, against The Commonwealth of Kentucky, appellee, upon an appeal from a judgment of the Shelby circuit court, together with the writ of error, citation, copies of the bond, and assignment of errors, as the same appear of record and on file in my office.

In testimony whereof I have hereunto set my hand and affixed the seal of my office. Done at Frankfort, Kentucky, this 5th day of July, A. D. 1899.

Seal Kentucky Court of Appeals.

SAMUEL J. SHACKELFORD,
Clerk Kentucky Court of Appeals.

Fee for this transcript, $13.00.

50 STATE OF KENTUCKY, } *sct:*
Court of Appeals, }

I, James H. Hazelrigg, chief justice of the court of appeals of Kentucky, hereby certify that Samuel J. Shackelford, who hath given the preceding certificate, is clerk of said court, and that his said attestation is in due form.

Given under my hand this 5th day of July, A. D. 1899.

JAMES H. HAZELRIGG,
Chief Justice Court of Appeals of Kentucky.

Endorsed on cover: File No., 17,470. Kentucky court of appeals. Term No., 356. The Chesapeake and Ohio Railway Company, plaintiff in error, *vs.* The Commonwealth of Kentucky. Filed July 21, 1899.